

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 17, 2004

THOMAS J. FAULKNER, JR. v. STATE OF TENNESSEE

Appeal from the Circuit Court for Grainger County
No. 7403 O. Duane Slone, Judge

No. E2004-00813-CCA-R3-PC - Filed October 12, 2004

The Appellant, Thomas Jefferson Faulkner, Jr., appeals as of right from the judgment of the Grainger County Circuit Court denying his petition for post-conviction relief. Faulkner argues that he was denied the effective assistance of counsel at sentencing due to trial counsel's failure to introduce mitigating evidence. After a review of the record, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ALAN E. GLENN, JJ., joined.

Robert M. Burts, Rutledge, Tennessee, for the Appellant, Thomas J. Faulkner, Jr.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Brent C. Cherry, Assistant Attorney General; and Charles L. Murphy, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In 1999, Faulkner was convicted of four counts of attempted first degree murder and one count of theft over \$1,000, and he received an effective seventy-three-year sentence. The Appellant's convictions and sentence were affirmed on direct appeal. *See State v. Thomas J. Faulkner, Jr.*, No. E2000-00309-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Apr. 17, 2001), *perm. to appeal denied*, (Tenn. 2001). The relevant facts, as summarized by this court in the Appellant's direct appeal, reflect that:

In the light most favorable to the state, the evidence at trial demonstrated that Allison Christine "Chris" Hurt wanted her husband's ex-wife, Judy Hurt, killed so that she could live in the home occupied by Judy Hurt. Chris Hurt promised

Faulkner and the Ogles the pick of the personal property at the Judy Hurt residence if they would kill Judy Hurt.

. . . .

Judy Hurt was home that evening with her daughter, Angel Olsen, her son-in-law, Rick Olsen, and her granddaughter, Haley Olsen. Rick Olsen was on the living room sofa when Ms. Hurt answered the door to Ted and Ronnie Ogle.

That night, the defendants lay in wait outside the Hurt home until all of the lights were out. They cut the phone lines to the home. Sometime between approximately midnight and 2:00 a.m., Faulkner, Ted Ogle and Terry Ogle opened fire on the first floor of the home, where all four of the victims were asleep. Two-year-old Haley Olsen suffered two bullet wounds. One of the bullets lodged in her pelvic area and could not be removed by medical personnel. Judy Hurt sustained a gunshot wound to the elbow. The hail of gunfire so badly damaged the sheetrock walls that the dust from loose sheetrock made “smoke” throughout the house. The bullets penetrated a hot water heater, and hot water sprayed into the home.

Immediately after this assault, Faulkner, Ted and Terry Ogle fled the scene in Rick Olsen’s truck. Once the defendants were all gone, the victims went to Jefferson City Hospital, where Judy Hurt and Haley Olsen were treated for their injuries. Haley Olsen had to be transported to University of Tennessee Medical Center in Knoxville due to the extent of her injuries.

Faulkner acknowledged in a statement given to law enforcement, “Our plan was to kill everyone in the house and steal the stuff in it. I was supposed to shoot in a window with Terry and the people were going to be shot by Ted as they ran to the front of the house.” He also admitted shooting into the house and taking the truck.

The defendant’s version of events at trial was that he was a minimal player in the crimes. He claimed that he had no recollection whether Chris Hurt asked him to kill Judy Hurt. He said his only intent in going to Judy Hurt’s home was to steal property. He specifically disavowed any intent to injure anyone, and he claimed that there were many facts in his pretrial statement that were untrue. Faulkner testified that he was extremely intoxicated on the night of the crimes and had no memory of portions of the evening while he was at the Hurt residence.

Id.

On September 9, 2002, the Appellant filed a petition for post-conviction relief, wherein he argued that he received the ineffective assistance of counsel. A hearing was held on September 22,

2003, at which the Appellant and trial counsel testified. The post-conviction court denied relief by written order on April 22, 2004. This timely appeal followed.

ANALYSIS

The Appellant contends that “trial counsel was ineffective because the wrong psychiatric report was submitted at his sentencing and included in the appellate record.” The following facts are pertinent to the issue as presented by the Appellant. Dr. Russell D. McKnight performed a psychiatric evaluation of the Appellant prior to trial and prepared a report based upon his observations of the Appellant. In the report, Dr. McKnight stated,

In my opinion [the Appellant] at the time of the attempted break-in for which he was arrested was under the influence of multiple drugs including marijuana, Valium and cocaine. I think it is probable that he was heavily intoxicated at the time and that he has impaired memories of these events.

At the post-conviction hearing, trial counsel testified that the defense theory was, “[W]e proceeded on the fact that [the Appellant] was intoxicated and therefore couldn’t form specific intent as far as attempting to kill someone.” Trial counsel further testified,

At the trial I didn’t feel like what Dr. McKnight said rose to the point of being a defense, at that point. My intention was, certainly, to use that at the sentencing without having to call Dr. McKnight. . . .

. . . But it was my intention, while I didn’t think it made a defense, I thought it mitigated, particularly at his young age, I think this happened like six or seven days after he was eighteen, with that certainly should have had some influence on the jury and perhaps get him a lesser sentence.

At the sentencing hearing, a report was introduced into evidence. In support of mitigation, trial counsel argued that:

Also, in looking at the report from Dr. McKnight - - we did file some mitigating factors.

. . . .

I submit to the Court in looking at the report of Dr. McKnight and in looking at this Pre-Sentence Report he deserves to have more feeling from the Court I think as far as his age and his situation at that point in time; as far as his background, too.

Following the conclusion of proof, the trial court imposed a seventy-three-year sentence. In pronouncing the Appellant's sentence, the trial court stated that such a sentence was warranted "[b]ased upon the evidence in this case, the Pre-Sentence Investigation."

The Appellant appealed his sentence to this court, arguing that his sentence was excessive. However, Dr. McKnight's report was not included in the record on appeal. This court noted,

In support of factor (8),¹ mental or physical condition that significantly reduced culpability for the offense, it appears that the defendant intended to offer a psychiatric report of Russell D. McKnight, M.D. The only report of Dr. McKnight in the appellate record, however, pertains to an individual named Randy Bowlin, who appears to be another client of the defendant Faulkner's attorney. Nothing in Dr. McKnight's report relative to Randy Bowlin has any bearing on the defendant Faulkner's mental or physical condition. As such, the trial court committed no error in declining to apply mitigating factor (8).

Id. (footnotes omitted). Moreover, the State concedes that the trial court did not have the correct report at the sentencing hearing.

To succeed on a challenge of ineffective assistance of counsel, the Appellant bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2003). The Appellant must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Appellant must establish (1) deficient performance and (2) prejudice resulting from the deficiency. The Appellant is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependant upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

It is unnecessary for a court to address deficiency and prejudice in any particular order or even to address both, if the petitioner makes an insufficient showing on either. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the Appellant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

¹Tennessee Code Annotated section 40-35-113(8) (2003) provides as a mitigating factor that "[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor[.]"

At the sentencing hearing, the Appellant testified about his problems with drugs and alcohol, and trial counsel referred to the information contained in Dr. McKnight's report during his argument in support of mitigation. Moreover, the Appellant, his aunt, and his cousin testified at trial concerning his intoxication on the night the crimes were committed. Although the trial court may not have received the correct report, the court was aware of the information contained in Dr. McKnight's report through the testimony of witnesses and the argument presented by trial counsel. Most importantly, as noted by this court on direct appeal, "To the extent that the defendant may have been relying on trial evidence that he was intoxicated at the time of the offense, factor (8) specifically excludes mitigation on this basis." *Thomas J. Faulkner, Jr.*, No. E2000-00309-CCA-R3-CD (citing Tenn. Code Ann. § 40-35-113(8) (2003)). Thus, the Appellant's argument that "the correct report would have helped in describing the degree and effect of [his] intoxication" at the time of the crime is misplaced, as our legislature has specifically removed voluntary intoxication as a relevant mitigator for sentencing purposes under factor (8). Accordingly, we conclude that no prejudice resulted from the alleged deficiency. This claim is without merit.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court did not err in ruling that the Appellant received the effective assistance of counsel. Accordingly, the judgment of the Grainger County Circuit Court is affirmed.

DAVID G. HAYES, JUDGE